No. 2798.

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

T. F. Turner.

Appellant.

vs.

Kate J. Wells and Ironsides Reduction and Leasing Company, a corporation,

Appellees.

BRIEF OF APPELLANT.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

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STATEMENT OF THE CASE.

This is an action on a grub-stake contract to recover from Kate J. Wells and her privies in interest a two-thirds interest in the claims described in the petition on account of the fraudulent conspiracy between she and her husband, A. W. Wells, to locate these claims in her name and the name of her son, Burgess Robinson, while Wells was working under said grub-stake contract, and while Burgess Robinson was helping Wells on said contract and with full knowledge of the terms of the grub-stake contract.

On or about the 1st day of March, 1907, at Rhyolite, state of Nevada, the plaintiff and J. F. Creel, as outfitters, entered into an agreement with A. W. Wells, as prospector, whereby the outfitters contracted and agreed to furnish the prospector, Wells, with a team, wagon, camp outfit, money and supplies for prospecting for minerals upon the public mineral domain in the United States, and it was agreed that Burgess T. Robinson, his step-son, should accompany Wells, to assist him in the work of prospecting, but that owing to the fact that the said Robinson was not of age, he was not to be allowed to participate in the property discovered, except as to such part as might be agreed upon between he and A. W. Wells, who was permitted to share his one-third interest with the said Robinson. It was further agreed that all mineral deposits discovered by said Wells and Burgess Robinson, while supplied by plaintiff and said Creel with said outfit and supplies, should be located in the names of this plaintiff and said J. F. Creel and A. W. Wells, and that each should be entitled to an undivided one-third (1/3) interest in all such discoveries and locations. That in pursuance of said contract the plaintiff and said Creel furnished the said Wells with the outfit, money and supplies agreed upon, and that the said Wells and Robinson left the state of Nevada and journeyed to that portion of Inyo county, California, now known as the Beveridge Mining District; that at some time between, at or about the making of said contract, and the month of August, 1907, or thereabouts, the said A. W. Wells and the said Burgess T.

Robinson entered into a conspiracy with the defendant Kate J. Wells, for the purpose of defrauding and unjustly depriving the plaintiff and J. F. Creel of their interest in discoveries of the mineral made and to be made by the said A. W. Wells, and that in pursuance of such conspiracy and while the said A. W. Wells and said Burgess T. Robinson were acting in pursuance of said contract, and had possession of said outfit, money and supplies of plaintiff and said J. F. Creel, the said A. W. Wells and Burgess T. Robinson made certain valuable discoveries of mineral in said Beveridge Mining District, and in violation of their contract with the plaintiff and said J. F. Creel, located the said discoveries in the name of Kate J. Wells and Burgess T. Robinson.

Testimony was also introduced to establish that said A. W. Wells made discovery of all said mining locations, and that he and Burgess T. Robinson performed all the necessary acts of location, and that the said A. W. Wells dictated or wrote the notices of location, and that the same were filed for record at his request in the office of the county recorder of Inyo county, California. [Transcript, page 55.]

It was also shown that neither the plaintiff nor his assignor was chargeable with any facts or information with which to put him upon his inquiry, as to said fraud, until about the month of December, 1911. Having fully satisfied themselves of the merits of their claim to said property, and the said Creel being without funds with which to prosecute an action for the recovery of their interest in said property, the said

Creel, for a consideration, sold, assigned and conveyed unto this plaintiff all his right, title and interest in the property. On February 11, 1912, A. W. Wells wrote a letter to this plaintiff, addressed to him at Boston, and also to J. F. Creel, in which he stated that a conspiracy had been entered into between Kate J. Wells, Burgess T. Robinson and himself to defraud said Turner and Creel out of the mining claims located by him while working on the grub-stake of said Turner and Creel. [Transcript page 47.] This plaintiff employed counsel, and in the month of December, 1912, instituted this action against said Kate J. Wells and others for the recovery of said mining claims, or his lawful interest therein. In September, 1914, A. W. Wells died. The cause was tried to the court, and on March 13, 1915, the court rendered its decree dismissing plaintiff's second amended bill of complaint, from which decree this appeal is prosecuted.

ASSIGNMENTS OF ERROR.

The decree is erroneous in that instead of dismissing complainant's second amended bill of complaint, it should have decreed the plaintiff, T. F. Turner, the rightful owner of a two-thirds interest in and to the mining claims described in his second amended bill of complaint, as more fully appears in the following assignments of error:

I.

That the court erred in holding that the oral testimony of plaintiff in connection with the written state-

ment of A. W. Wells dated the 11th day of February, 1912, was insufficient to establish the conspiracy between A. W. Wells, Burgess T. Robinson and the defendant, Kate J. Wells, as alleged in plaintiff's second amended bill of complaint.

II.

That the court erred in holding that the oral testimony of plaintiff in connection with the written statement of A. W. Wells dated the 11th day of February, 1912, was insufficient to establish the fraudulent transaction between A. W. Wells, Burgess T. Robinson and the defendant, Kate J. Wells, as alleged in plaintiff's second amended bill of complaint.

III.

That the court erred in holding that the written statement of A. W. Wells dated the 11th day of February, 1912, by which it was sought to establish the fraudulent transaction between A. W. Wells, Burgess T. Robinson and the defendant, Kate J. Wells, was not sufficient proof to establish the conspiracy between said A. W. Wells, Burgess T. Robinson and the defendant, Kate J. Wells, as alleged in plaintiff's second amended bill of complaint.

IV.

That the court erred in holding that the written statement of A. W. Wells dated the 11th day of February, 1912, by which it was sought to establish the fraudulent transaction between A. W. Wells, Burgess T. Robinson and the defendant, Kate J. Wells,

was insufficient proof to establish the agreement between A. W. Wells, Burgess T. Robinson and Kate J. Wells to defraud Turner and Creel in carrying out their grub-stake contract.

V.

That the court erred in rendering its decree dismissing plaintiff's second amended bill of complaint, for the reason that said decree is against the weight of the evidence and contrary to the law under the evidence.

ARGUMENT.

I.

The four assignments of error upon which appellant relies for a reversal, each covering, as it does, practically the same proposition, but stated in a different way, will all be considered together.

As indicated, the only question raised in this case is whether the letter containing the declarations of A. W. Wells, now deceased, was competent testimony to be received in this cause, to establish the conspiracy, and if competent, and so received, was it sufficient in law to warrant a decree in the lower court vesting in appellant a two-thirds interest in the mining claims described in appellant's second amended bill of complaint?

If that evidence were competent and in law sufficient, when corroborated by circumstances and admissions of parties and privies, then the decree of the lower court should have been in favor of the appellant, and the action of the lower court in dismissing the bill should

be reversed. The letter which was offered in evidence, being plaintiff's Exhibit "L" [Transcript pages 47 to 53], is as follows:

Lone Pine, Calif., Feby. 11th, 1912.

Mr. T. Frank Turner,

Boston, Mass.

Mr. J. F. Creel,

Los Angeles, Cal.

Gentlemen:

Pursuant to your request regarding the grub-stake agreement had between yourselves and myself I herewith attached a complete statement of our relations with each other as relates to that agreement and the carrying out of the same.

That on or about the first day of March, 1907, I came down from Goldfield to the home of J. F. Creel in Rhyolite, and remained there for a period of days with him, being at the time badly troubled with the rheumatism in one of my legs.

That during my stay there with him we talked many times of the possibilities of mining and the chances a person would have in some country in California in which I had had quite a little experience, and that upon the many occasions with Mr. Turner, Mr. Creel and others present, viz., E. Pritchard Smith, Mr. Godfry, Major C. W. Callahan and Ed. Whitney, relative to my going into the field to discover some ground containing mineral in the interest of yourselves and myself.

That it was finally agreed verbally between us and

in the presence of the above named parties and on occasions of others that I would go out for you provided you furnished me with a proper means of travel and that I would prospect and explore the country to the best of my ability and at all times to the interest of the three of us connected with the same, no limit of time being set upon the length of time of the life of the grub-stake or agreement.

That it was finally agreed that you would secure and later did secure a two mule team and light road wagon in which I was to start on the trip, that you also provided equipment and tools, feed and supplies for myself and team.

That then came the question of taking Burgess Robinson along to help me in my work and to carry out my agreement with you, and which was consented to by both of you. I went to Chloride Cliff in Inyo county, Calif., on the Funeral Range of Mountains, and there explained to the said Burgess Robinson in detail regarding the trip and he was agreeable to the same and at once accompanied me to the home of J. F. Creel in Rhylite, Nevada, and it was further agreed in the presence of ourselves and several of the above named witnesses that Burgess Robinson was to accompany me on the trip to help me.

It was also understood and agreed that the terms of the agreement was not altered except that Burgess was not to participate in the same only to the extent of whatever interest I myself might obtain from whatever was discovered or located.

That the fact being known at the time by all con-

cerned that the said Burgess Robinson being my son-in-law by marriage to Kate J. Robinson, and the further fact that he being a minor, under the age of twenty-one years of age, the matter of making an agreement with a minor not seeming possible we would not make him a party to the agreement otherwise than stated.

That during the latter part of March, 1907, after everything was in readiness, we picked up A. I. Warren, then of Lees Camp, Inyo county, Calif., who accompanied us as far as Skidoo, Calif., on agreement to secure an option on a lead and silver property then owned by one John Lamoine, and if possible to proceed to Los Angeles or any other place and to dispose of the same for the benefit of himself and the ones connected with this agreement.

That on or about the 19th day of March, 1907, we took leave of your presence and proceeded forth to prospect and discover and otherwise secure mineral rights by any means possible and legal but always to the interest of the parties connected with the agreement.

That we proceeded across the Death Valley, stopping at Skidoo, Calif., for a short time, where we left A. I. Warren, and Burgess Robinson and myself proceeded through the way of Ballerat, Darwin to Keeler, Calif., and from there into the White Mountains by the way of Swansea, a Station on the N. & C. R. R., and then and there prospected for mineral ground, that we discovered and located several claims near to the Station of Swansea known as the Combination,

Black Metal, Sunset, and the South Extension of the Black Metal, notice of which was made and later recorded in the office of the County Recorder at Independence, California.

That we then proceeded further into the mountains and there discovered numerous claims on the summit of the mountains and in what is known today as the Camp of Burgess.

That we located in the names of J. F. Creel, T. F. Turner and A. W. Wells the claims known and recorded as the Summit, Callahan, Don Creel, T. F. T. and the Extension, said claims being in the Canyon known as the Craig Canyon, through which passes the well known Hunter trail.

That on June 7th, 1907, we located and discovered what is known as the Golden Rule No. 2, as shown in the Mining Records in Book "Z," page 510, in the Office of the Recorder at Independence, Inyo County, Cal.

That on the 8th day of June, 1907, we discovered and located the claim known as the Golden Rule No. 3, as recorded in the Recorder's office at Independence, Inyo County, California, in Book "1," page 274.

That on June 22nd, 1907, we discovered and located the claim known as the Ironsides, and recorded in Book "Z," page 509, in the office of the Recorder at Independence, Inyo County, Calif.

That on June 22nd, 1907, we also discovered and located the claim known as the Catch-em-Mac, as shown of record in Book "L," page 276, in the Recorder's office at Independence, Inyo County, Calif.

That on June 28th, 1907, we discovered and located the claim known as the Iron Max, as shown of record in Book "1," page 277, in the office of the Recorder at Independence, Inyo County, Calif.

That on the 15th day of July, 1907, we discovered and located the claim known as the Grand View, as shown of record in book "1," page 545, in the Recorder's office at Independence, Inyo County, Calif.

That on July 29th we discovered and located the claim known as the Kate J., as shown of record in Book "1," page 546, in the Recorder's office of Independence, Inyo County, Calif.

That on August 1st, 1907, we discovered and located the claims known as "Garnet Fraction," as shown of Record in the Recorder's office at Independence, Inyo County, California, in Book "1," page 545.

That on August 17th we discovered and located the claim known as the Beveredge Belle, as shown in book "1," page 547, in the Recorder's office at Independence, Calif.

That on July 29th, 1907, we discovered and located the claims known as the Golden Rule No. 1, as shown in Book "6," page 578, in the Recorder's office at Independence, Inyo County, Calif.

That on July 29th we further located the claim known as the Protection No. 1, as shown in the records of the Recorder at Independence, Inyo County, Calif.

That we also located and discovered at and during this period of time the claim known as the Braca

Bronco, a record of which I have not now in my possession.

That at no time from the beginning of this agreement prior to August, 1907, was Kate J. Wells on the claims now in the County of Inyo, Calif., but that sometime about the 1st of August, 1907, or during that month, she arrived from Los Angeles and made her first appearance on the hill.

That Harold E. Robinson arrived on the Hill during the month of June, 1907, and was not in any way connected with this agreement nor in the location of these claims.

That at no time for several years prior to our arrival on the hill as stated was any of these claims located by myself or any one of the present occupants, in whose names they appear.

That during the location of the Kate J. claim there arose quite an argument between Kate J. Wells and Burgess Robinson and I said this is too much for me so I started for the Camp to get away from the argument and in going over the ground I remember stumping my foot over an outcrop and kicked off a piece of the rock and upon examining the same I found it to be well mineralized and that when they arrived at the Camp after making up I said to them while you folks were fussing I made a discovery and showed it to them and they went up in the air about it and we then went back and located the claim and did some work on it.

That to my certain knowledge in this case the loca-

tion notice was dated back to suit the occasion and the circumstances.

That all claims were located in the names of Kate J. Wells, Mrs. A. W. Wells and Burgess Robinson, my name not appearing on any of them, and that in every instance where the name appears as Mrs. A. W. Wells I personally wrote the location notice myself.

That in making this statement to you I have not been offered nor have I received any remuneration of any kind from either of you, and it is only done with the intent and purpose of putting you in a proper position to secure your rights under the agreement on the hill, to which so far you have been wrongfully detained.

And further that I will be willing and will at any and all times make oath to the effect that every word here is true, if called upon to do so, and will appear in any court of record and give the facts as they exist to my best recollection and belief.

Yours truly,

(Signed) A. W. Wells.

POINTS AND AUTHORITIES.

This letter contained the declarations of Wells, who had entered into a grub-stake contract with appellant Turner and Creel. He was a party to the conspiracy to defraud Turner and Creel. All of the transactions were peculiarly within his knowledge; the declarations were against his pecuniary interest as well; the declarations were calculated to incriminate him under the penal laws of the state, and the witness A. W. Wells

was, at the time these declarations were offered, dead, the concurrence of all of which conditions render this testimony absolutely competent and the evidence sufficient to warrant a decree in favor of the appellant.

As was said by the Supreme Court of Illinois:

> "This rule has been stated to be 'that one of the exceptions to the rule excluding hearsay evidence is the case of declarations of a deceased person having peculiar means of knowing a fact, made against his pecuniary interest, the law being that such declarations are admissible even in suits in which neither such deceased person nor anyone claiming under him was or is a party, provided such deceased person could have been examined in regard to the matter in his lifetime.' "
>
> Friberg v. Donavan, 23 Ill. App. 62.

And by the Supreme Court of the state of New York:

> "To the same effect, White v. Chouteau, that 'It has long been settled as one of the exceptions to the general rule excluding hearsay evidence that the declarations of a person, since deceased, against his interest, as well as of other incidental and collateral facts and circumstances contained in it, are admissible in evidence, irrespective of the question whether any privity existed between the declarant and the person against whom it is offered, provided the declarant had peculiar knowledge or means of knowing the matter stated, that he had no interest to misrepresent it, and that it was opposed to his pecuniary or proprietary interest.' "
>
> McDonald v. Wesendouck, 30 Misc. Rep. 605, 62 N. Y. Supp. 764;
>
> White v. Chouteau, 1 E. D. Smith, 497.

J. F. Creel, a witness for plaintiff, testified that he wrote this letter at the request of A. W. Wells and that Wells signed it, as follows:

"I next saw Wells about the 10th or 11th of February, 1912. I went to see him at Turner's request, and met him at Lone Pine, California, and had a conversation with him in relation to the manner in which he had carried out his grub-stake contract with us. I identify the instrument shown me [Plaintiff's Exhibit "L," Transcript pages 47 to 53]. It was written by me and signed by A. W. Wells."

This evidence was uncontradicted by defendants.

Defendant Kate J. Wells admitted that she knew that her husband, A. W. Wells, was working on the grub-stake contract for plaintiff and Creel, as testified to by Creel as follows:

"I am acquainted with Mrs. Wells, I met her in 1908, and had a conversation with her * * * in relation to the claims in controversy, and she said, 'Creel, I want to tell you that one corner of your Don Creel claim overlaps my Beverage Bell,' and I replied, 'Mrs. Wells, I don't know anything about that, the monuments on the Don Creel or any of the rest of the claims, Mr. Wells located these claims, and you will have to talk with him about that,' and she replied, 'Yes, but he did it while he was out for you and Turner.' She said Wells located the claims while he was out for us." [Transcript page 60.]

Mrs. Della Miles, a witness for plaintiff, testified:

"In the spring of 1907 Mrs. Wells came to my house and said some parties in Rhyolite, Nevada, had furnished an outfit for Wells and Burgess to go up to the Camp, and she had instructed them to locate everything up there." [Transcript page 57.]

All of the claims in controversy, with the exception of the Iron Max and the Golden Rule No. 1, were witnessed by A. W. Wells and recorded with the recorder of Inyo county, California, at the request of A. W. Wells. [Transcript pages 49, 50, 51, 52, 54 and 55.]

The written statement of Wells and the oral testimony of the witness J. F. Creel is corroborated in various parts of the testimony as shown by the transcript.

Della Miles further testified that she had a conversation with Burgess Robinson, Mrs. Wells' son, who was since deceased, and who was a privy in interest of Mrs. Wells, as she took by inheritance on his death any interest he might have, in which he said:

"This conversation was along, I should say, the first of September. I came up the 12th of August, 1907, and this must have been about the first of September, after I came there. There had been some trouble down to the Camp, and Burgess came up and said that he was going to get out of there, that Wells and his mother was raising so much fuss that Creel and Turner would come in and take the whole thing anyhow as soon as they heard of it." [Transcript page 58.]

W. D. Redfield testified:

"I had a conversation with Mrs. Kate Wells in 1909, in which she told me that she was in Los Angeles when Wells and Burgess left Rhyolite, Nevada, and that Burgess was not known in the grub-stake contract with Creel and Turner." [Transcript page 58.]

The statements of Burgess Robinson, being a predecessor in interest of Kate J. Wells, are equivalent to statements by her.

> "One of the exceptions to the rule excluding hearsay evidence is, that declarations or statements, whether verbal or written, made by a person since deceased, against his interest, as to facts of which it was his duty to know, are, if pertinent to the matter under investigation, admissible in evidence as between third persons, whether made at the time of the occurrence of the fact declared or subsequently."

Field v. Boynton, 33 Ga. 239;
Friberg v. Donovan, 23 Ill. App. 58, 62;
County of Mahaska v. Ingalls, 16 Ia. 81;
Hosford v. Rowe, 41 Minn. 248, 2 N. W. 1018;
Baker v. Taylor, 54 Minn. 71, 55 N. W. 823;
Hinkley v. Davis, 6 N. H. 210, 25 Am. Dec. 457;
White v. Chouteau, 1 E. D. Smith 497;
McDonald v. Wesendouck, 30 Misc. Rep. 605, 62 N. Y. Sup. 764;
Peace v. Jenkins, 10 Ired. 355;
Trego v. Huzzard, 19 Pa. St. 441;
Taylor v. Gould, 57 Pa. St. 153;
Gilchrist v. Martin, Bailey Eq. 492;
Conger v. Daniel, McMull. Eq. 157.

"Verbal declarations are receivable in evidence in an action between third parties, when accompanied by the following pre-requisites:

1. The declarant must be dead; 2. The declarations must have been against the pecuniary interest of the declarant at the time it was made; 3. The declarations must be of a fact in relation to a matter concerning which the declarant was immediately and personally cognizable; and, 4. The court should be satisfied that the declarant had no probable motive to falsify the fact declared."

The County of Mahaska v. Ingalls, 16 Ia. 81.

"In the District Court the plaintiff moved to set aside the report of the referees, because on the trial before them they had admitted improper testimony. This motion was overruled and the plaintiff excepted, and this is the only point which his appeal presents. It appears from the bill of exceptions that on the trial before the referee, the defendants, for the purpose of showing that the defalcation, if any existed, had occurred before the execution of the bond in suit, introduced as a witness one John White, who testified that he had a conversation with Shoemaker before his death, and about the 20th day of August, 1858 (which it will be observed was prior to the execution of the bond in suit), and with regard to the condition of the public funds.

Against the plaintiff's objections the witness was permitted to testify as follows: 'Mr. Shoemaker told me that there was over $2,000 in the summer of 1858, that he was behind as treasurer of the county, and he wanted an arrangement made by which I should pay it. I agreed to fix it up, if

Moreland would secure me. I afterwards saw Moreland, and he agreed to do so, but never did it, and the agreement was not perfected. This conversation was about August 20, 1858.'

Against the plaintiff's objections, likewise, one Coolbaugh was permitted to testify 'That the said John H. Shoemaker, in the summer of 1858, said, in the presence of Coolbaugh, that he, the said Shoemaker, was behind with the county of Mahaska in the sum of about $2,700.'

The materiality and decisive importance of this testimony are apparent from the statement of the case above given, and from the report of the referee and the judgment of the court thereon; and whether this cause shall be examined or reversed depends solely upon the admissibility in law of this evidence.

The question which thus arises upon the record is one which has never before been presented to this court."

Mahaska Co. v. Ingalls, 16 Ia. 84, 85.

"The inquiry, then, as to the state of the Shoemaker accounts, at and before the time the bond in suit was executed, was one of indispensable importance. It may be inferred from the report of the referees that his official books and papers threw no light upon this subject. In this exigency the sureties offered the testimony of which the plaintiff now complains. This testimony consisted of verbal admissions of their principal on two separate occasions, and to two different persons, prior to the execution of the bond in suit, and that he was behind, as treasurer of the county, in the sum of about $2,700.00. And here it is material to be noted that these declarations, or, more properly

speaking, admissions, are distinctly and unequivocally stamped with the following marked features:

'1st. They were made against the pecuniary interests of the declarant, for they were of such a nature, so circumstantial and precise, as to constitute in an action against him by the plaintiff, the foundation and evidence of a legal liability to that extent.

2nd. They involved, moreover, the admission of conduct on his part, which would render him, if known, infamous in the eyes of the law; for the penal statutes of the state declare that every officer who shall unlawfully 'take, convert, invest, use, loan, or fail to account for, any portion of the public money entrusted to him, shall be imprisoned in the penitentiary, fined in a sum equal to the amount embezzled, and be also disqualified from holding any office under the laws or constitution of the state.

3rd. They were not only made *ante litem motam,* but were made long prior to the execution of the bond in the suit, and consequently without any reference to the controversy which has since arisen.

4th. The declarant was dead at the time these admissions were offered and received as evidence in an action between third parties, viz., between the county and his sureties.'

Such were the circumstances and nature of these admissions, and now the questions recur, were they competent and legal evidence.

If these same facts had appeared by written entries or statements, the deceased party being in a position to know the facts, and the facts being

undeniably adverse to his interest, there is no question as to their being receivable in evidence."

County of Mahaska v. Ingalls, 16 Ia. 86-7.

The written declarations of Wells were not only against his pecuniary and proprietary interests, but were such as would subject him to penal consequences, which would add to its weight, conceding his statements to be true, for he was guilty of embezzlement under the California statutes by the appropriation to his own use of the money held by him in trust for the benefit of Creel and Turner. In reference to the admission of testimony of this character, it was said by the Supreme Court of Iowa, in examining the case of Mahaska County versus Ingalls, 16 Iowa 81, as follows:

"In an action against a county treasurer for failing to account for certain moneys collected as taxes, the declarations to a third person, of an assistant in the office employed by the board of supervisors, and who had since deceased, to the effect that he had converted money received for taxes to his own use and falsified the books to conceal this defalcation, were held admissible on the part of the defendant."

"The respective counsel have ably discussed the question of the competency of this testimony in the light of principle, and the numerous adjudicated cases bearing upon it. The question, however, underwent a careful and elaborate examination by the court in Mahaska County versus Ingalls, 16 Ia. 81, in an able opinion prepared by Dillon, J., in which the authorities cited by counsel

and others were referred to, and some of them reviewed. It was held that such testimony was competent. We say *such* testimony because there, as here, the declarant was dead; the declaration was otherwise admissible by the testimony of a witness who heard them."

Scatt Co., vs. Fluke, 34 Ia. 317-322.

It is submitted that having shown that Mrs. Wells knew of the grub-stake contract between Wells, Creel, Turner and Burgess Robinson; that Creel and Turner were furnishing the provisions, tools and conveyances and that Wells and Burgess Robinson had located the claims in question in the name of Kate J. Wells while they were working under the grub-stake contract, thereby defrauding Turner and Creel, the declarations and statements of A. W. Wells, corroborated, as they are, by the statements of Burgess Robinson, against interest, uncontroverted and unexplained, are sufficient in law to establish the conspiracy.

For these reasons it is contended that the defendants fraudulently withhold from the plaintiff, T. F. Turner, a two-thirds interest in and to the mining claims which are the subject of this controversy, and which are described in complainant's second amended bill of complaint, and if substantial justice is to be done by the enforcement of the too plain principles of the law, the decree should be in favor of complainant-appellant.

Respectfully submitted,

WM. B. OGDEN,
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Solicitors for Complainant-Appellant.